



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 40 OF 1985

IN THE MATTER OF THE ESTATE OF JAMES KIHARA NJOROGE (DECEASED)

IRENE WAMBUI KIMANI..... APPLICANT

VERSUS

CECILIA WANGARI KIHARA.....RESPONDENT

JUDGMENT

1. The deceased James Kihara Njoroge died testate on 8th March 1984. He was survived by two wives, the respondent Cecilia Wangari Kihara and Monica Wamaitha Kihara (deceased). In all he had 12 children, among them the applicant. According to his Will, the deceased left his vast estate to be equally distributed between his two wives who would then share their respective shares with their children. The deceased appointed his brother Mugo Njoroge (deceased) as executor of the Will. A grant of letters of administration with Will annexed was issued to Mugo Njoroge (deceased) on 23rd April 1985 and confirmed on 23rd October 1992.

2. The applicant was from the house of Monica Wamaitha Kihara. She brought the present application dated 11th November 2011 seeking orders that the certificate of confirmation of grant dated 23rd October 1992 issued to Mugo Njoroge be annulled and/or amended to vest half of the shares of plot No. 283/111 & 129/IV/MN under title number C.R. 5726 to her on behalf of the estate of Monica Wamaitha Kihara and that, in the alternative, all consequential orders made pursuant to confirmation of the grant be annulled and the estate distributed afresh. The application was based on the grounds that the executor and the respondent made untrue allegation of facts when obtaining the confirmation of grant, and omitted the following 4 properties from the certificate of confirmation of grant and from distribution:

- a. Plot No. 283/111 and 129/IV/MN under title number C.R. 5726 (Kikambala property);
- b. L.R No. 533/298 in Molo Nakuru District which has since been transferred to Joyce Wanjiku Kariuki;
- c. C.R 13052/2 which has been subdivided into plot No. 9370 to 9381 and divided amongst the respondent and her children; and
- d. Plot No.172 (C.R 2706) in Likoni which the respondent had subdivided into 1925/1 Ms and 1926/1 and thereafter given one portion to her son Paul Mbugua and the other one to Fatuma Abdalla Mwakanga.

3. The application was supported by the affidavit of the applicant dated 7th November 2011 and filed on 11th November 2011 in which she alleged that the respondent, in collusion with the executor omitted the 4 listed properties from distribution among the two families of the deceased, and conspired to defraud the siblings of Monica Wamaitha Kihara who had passed on by that time.

4. The application was opposed by the respondent. She stated that in the inventory of assets filed by the executor, he listed all known assets including those whose title numbers he did not know and that the Kilifi land was among the properties listed. Regarding the Kilifi property, she stated that the property was actually at Kikambala and lay on both sides of the Mombasa-Malindi highway, with the highway cutting in between; and that the bigger portion of the land (also referred to as Kwa Muhindi because it was leased to an Asian) was given to Monica Wamaitha Kihara (the applicant's mother) while the other portion (also referred to as Kwa Ng'ombe because it was used for rearing cattle) was transferred to her in title No. C.R 572. She denied owning plots number 129 and 283, and stated that her title C.R 5726 was only on plot No.129 which was a subdivision of the original title. She alleged that the title C.R 13052 was distributed by the executor to herself, among other properties.

5. Regarding Plot No. 172-(C.R 2706), she stated that no title documents were annexed to establish that she had subdivided it into 1925/1 Ms

and 1926/1 and given one portion to her son; that the plot was never registered in the name of the deceased; that she did not know one Fatuma Abdalla Mwakanga; and that the deceased had built a very small bar on the property and when he passed away, she suspected that when the owner realized that he could not evict her son from the property, he transferred the small portion on which the bar stood to her son. It was her case that she did not disinherit anyone as the property that was transferred to her was based on the Will of the deceased.

6. The matter proceeded by *viva voce* evidence. Both parties gave evidence in court in support of their cases. The respondent called a surveyor. Parties also filed written submissions. I have considered the affidavit and oral evidence and the written submissions. The issues for determination by the court are whether the disputed properties belonged to the deceased; whether they were omitted from the schedule of distribution of the estate of the deceased between the applicant's mother and the respondent; and whether the distribution in any way disadvantaged the applicant and her late mother's house.

7. Among the list of properties alleged to have belonged to the deceased and left out of the schedule for distribution were plot No. 283/11 and plot No. 129/IV/MN under title number C.R. 5726. The applicant stated that all along she knew the land belonged to her mother and that when her mother died she went to a surveyor who pointed out the land to her, but that she found the land was in the name of respondent, a fact that was confirmed by the search she conducted on 23rd August 2011. She further stated that according to the entries on the title the property was transferred by the executor to the respondent on 14th June 1996 and this was after the death of the deceased and of her mother. She annexed to her affidavit in support of the application a copy of the title for the Kikambala property and a certificate of postal search which confirmed the registered owner of the properties to be the respondent. The respondent testified that plot no. 129/IV/MN was her land over which she had had title for over 20 years, and that she was assigned the property by the executor following the distribution of the estate of the deceased. She also stated that the land referred to as Kwa Muhindi was bigger than Kwa Ngombe and was assigned to the applicant's mother. It was her case that the beneficiaries together with the executor knew about the Kikambala property, that she did not know why the property was not included in the list of assets owned by the deceased, and that the exclusion was by mistake.

8. When the surveyor Ben Mwaura Karanja (DW2) testified, and produced a report dated 15th May 2017, he stated that plot No. MN/3/283 neighbours plot No. MN/IV/129 but that the former had never been owned by the deceased, or the respondent. His evidence was that plot No. MN/IV/129 had been changing hands until 14th June 1996 when it became registered in the name of the respondent; that an excision survey to create the new Mombasa/Malindi road caused plot No. MN/10/129 to be subdivided into MN/IV/129/1 (2.646 acres) which became the road reserve and MNB/IV/129/2 (15.85 acres) which became plot No. MN/111/481 with reference to plan FR No. 99/5 generating deed plan 82259. The section number changed from IV to III due to the change of road alignment since the road was the sectional boundary.

9. I have looked at the executor's affidavit dated 18th September 1995 (and which the respondent made reference to). There was no reference to plots Nos. 129/IV/MN or MN/III/283. The respondent stated that Plot No. 129/IV/MN was assigned to her by the executor during the distribution of the estate. However, now that the executor makes no reference to it, how did he distribute it to her? Nonetheless, what is clear is that the plot belonged to the estate of the deceased, and that is why the respondent could plead that he is the one who allocated it to her. Since this plot was available for distribution, and considering the terms of the Will, the executor ought to have shared the property equally between the two houses.

10. There was an allegation that plot No. L.R No. 533/298 in Molo Nakuru District had since been transferred to Joyce Wanjiku Kariuki. The respondent denied any knowledge of the property. The applicant did not produce any title documents to establish ownership of the property, either that it belonged to the deceased or that it had been transferred to Joyce Wanjiku Kariuki. I find that the allegation was not substantiated.

11. Regarding the allegation that C.R 13052/2 had been subdivided into plots No. 9370 to 9381 and divided amongst the respondent and her children, I note that the executor's affidavit confirmed that C.R 13052/2 had been allocated to the respondent. The property cannot be re-distributed.

12. Lastly, on the allegation that the respondent had subdivided plot No.172 (C.R 2706) in Likoni into 1925/1 Ms and 1926/1 and thereafter given one portion to her son Paul Mbugua and the other one to Fatuma Abdalla Mwakanga, the applicant stated that the properties had been transferred to other people, but indicated that she did not have the searches for the properties. The respondent stated that the deceased had leased the land and when he died the owner subdivided the land into many plots and sold them, and her son Paul Mbugua bought one of them. The burden was on the applicant to prove that plot No.172 (C.R 2706) in Likoni belonged to the deceased. The burden was not discharged. I find that the property was not shown to be part of the estate of the deceased.

13. In conclusion, I declare that plot No. MN/IV/129/2 (which became plot No. MN/111/481) measuring about 15.85 acres which is registered in the name of the respondent, and which belonged to the deceased, is so registered and held in trust in equal shares between her (the respondent) and the applicant's late mother Monica Kihara Wamaitha for their respective children. I order the registration to be cancelled so that there will be fresh registration in equal shares between the respondent and the administrator of the estate of Monica Wamaitha Kihara.

14. This was a family dispute. Each side shall pay own costs.

DATED and DELIVERED at NAIROBI this 30TH day of MAY 2018.

A.O. MUCHELULE

JUDGE